

**Before the
Federal Communications Commission
Washington, DC 20054**

In the Matter of)	
)	
Choice Communications LLC)	
)	
Petition For Designation as an)	Docket No. 96-45
Eligible Telecommunications Carrier in)	
the United States Virgin Islands)	
_____)	

REPLY COMMENTS OF CHOICE COMMUNICATIONS LLC

Robert J. Aamo
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, NW, Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

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Choice Communications LLC (“Choice”), by its attorneys and pursuant to a Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) on February 9, 2005,¹ hereby submits these reply comments in response to the comments filed by the Virgin Islands Telephone Company d/b/a Innovative Telephone (“Innovative”) and the Verizon telephone companies (“Verizon”) opposing Choice’s Petition for Designation as an Eligible Telecommunications Carrier (“ETC”) in the United States Virgin Islands (“USVI”) (the “Petition”).

I. INTRODUCTION AND SUMMARY

As explained below, the two oppositions do not identify any valid ground to delay or deny consideration of Choice’s Petition. The Commission should not afford any material weight to Innovative’s comments. Innovative is the incumbent monopoly local exchange carrier in the USVI, and it is opposing Choice’s Petition in an attempt to preserve its monopoly status by

¹ *Parties Invited to Comment on the Petition of Choice Communications LLC for Designation as an Eligible Telecommunications Carrier in the United States Virgin Islands*, CC Docket No. 96-45, DA 05-355 (rel. Feb. 9, 2005).

preventing new entry in the USVI. Contrary to Innovative's arguments, the Telecommunications Act of 1996 has failed to generate any real local telephone competition in the USVI. Innovative itself previously has emphasized that there is no competition in the USVI telecommunications market, and that there cannot be competition in that market because small players cannot raise sufficient capital to compete in that market.² Innovative's revealing comment that it is willing to "accommodate[]" competition from new entrants belies the stark market reality that Innovative enjoys, and continues to abuse, unchecked market power over local telephone services in the USVI.

The public interest requires grant of Choice's application. It is a daunting task to provide competing telecommunications services in the USVI, which is characterized by a relatively small population, geographic insularity, and a high-cost environment, including challenging topographical, terrain, climactic and weather conditions. There are no adjacent regions where a new entrant can introduce services with the plan to expand service into the neighboring USVI when it becomes cost-effective to do so, thereby eliminating a common source of new entry. Competition is made even more difficult by Innovative's entrenched status as the sole ETC provider in the USVI, which results in Innovative receiving tens of millions of dollars in annual subsidies.³ Innovative knows as well as Choice that new entry will not occur unless the new

² See Valeria Escobari, *Small is Beautiful*, PODER, at 23 (July 2004) (quoting Innovative's CEO, Jeff Prosser, stating, "[the USVI] is a great market for us, but for a competitor, it's not big enough, and small payers have trouble raising the capital..."), available at Innovative's website, www.iccvi.com (attached as Exhibit 1).

³ In addition to universal service support, Innovative receives substantial tax breaks as an EDC (receiving benefits from the Economic Development Commission) in the USVI, including a reduction of income tax and complete relief for excise and property tax. See Megan Poiniski, *EDC Moves to Extend Innovative Telephone's Tax Benefits*, THE DAILY NEWS, Mar. 5, 2005, at 8 (stating that the Economic Development Commission voted to extend Innovative's tax benefits that provide it substantial relief). Interestingly, the VIPSC recently granted a rate increase to Innovative based on the anticipated expiration of Innovative's EDC tax benefits. Despite the rate increase, Innovative still sought—and

entrant receives ETC status so that it may use universal service support to compete aggressively against Innovative. Without ETC status, Choice will not be able to broadly enter the local telecommunications market in the USVI, and Innovative knows full well that no other entity is likely to do so either. Nearly ten years of non-entry after adoption of the Telecommunications Act of 1996 is mute testimony to the inherent difficulty of developing a competitive market in the USVI. Choice's pending ETC application is the (last) best chance for new entry in the USVI by an entity with sufficient resources to establish a real competitive alternative to Innovative. The consumers in the USVI are waiting and hoping for the Commission to create the conditions necessary for competition by granting the pending application.

USVI consumers badly need real competitive alternatives. There is widespread dissatisfaction in the USVI with Innovative's overpriced and sub-standard telephone service.⁴ Prices are excessive, telecommunications quality is unreliable, new installations are painfully slow, and customer service is deficient. Innovative not only is the recipient of significant universal service support today, but also is further insulated against competitive entry by the rural telephone company exemption (*see* 47 U.S.C. §251(f)) from certain pro-competitive obligations imposed on incumbent local exchange carriers ("ILECs") in section 251(c). Although Innovative likes to portray itself as a "rural" telephone company, in fact it is the largest privately owned, independent ILEC in the United States, and it is on the short list of the ILECs who draw the most universal service subsidies on a per capita basis. If granted ETC status,

received—EDC benefits. *See* Molly Morris, *PSC Irked by Innovative Bid to Renew Tax Breaks*, THE SOURCE, Aug. 10, 2004 (articles cited herein attached as Exhibit 2).

⁴ *See, e.g.*, Letter to the Editor from Anna Clarke, *Service Has Deteriorated Since ICC Takeovers*, THE SOURCE, Nov. 16, 2004; Letter to the Editor from Kevin Weatherbee, *Innovative's Features Not So Special, Need To Fix*, THE SOURCE, Dec. 26, 2002; Michelle Charles, *Rate Payers Voice Dissatisfaction With Service*, ST. THOMAS SOURCE, July 9, 2003 (attached as Exhibit 3); *see also* Comment of Dan Johnson, CC Docket No. 96-45 (Mar. 4, 2005) (stating that Innovative's phone service is unreliable and urging the Commission to grant Choice's ETC application).

Choice will ensure that, for once, Innovative is forced to earn its market share in competition with a well-funded and efficient rival.⁵

Innovative's own conduct demonstrates that it has abused its market power to the detriment of consumers for years. As one example, for years Innovative has failed to file mandated performance reports with the VIPSC.⁶ Innovative's handling of universal service funds already has been the subject of an FCC investigation and resulting consent decree,⁷ and the Commission should not reward Innovative's misconduct by allowing it to remain the only ETC in an area where consumers need—and want—competition. Granting Choice's Petition will serve the public interest by providing consumers in general, and residential subscribers in particular, with their first real alternative to Innovative.

Furthermore, granting Choice's application is in the public interest because it will ensure a more robust telecommunications infrastructure in the USVI. Choice will compete against Innovative's legacy landline service through a state-of-the-art fixed wireless local loop and transport network. Consumers will benefit because Choice will be able to serve certain areas that Innovative cannot or will not (*e.g.*, Little St. James Island and Lovango Cay). Hence, granting Choice's Petition will ensure that a higher percentage of USVI consumers have access to voice-grade services. Also, in cases where a hurricane or other event damages or destroys significant telecommunications infrastructure on the USVI, it will be beneficial to have both a wireline

⁵ In its comments, Innovative claims that it will spend \$100 million over the next five years to improve its service (*see* Innovative Comments at 28), but Choice has not found any support for this statement other than an article in the Daily News, which is owned by Jeff Prosser, Innovative's CEO.

⁶ *See* Transcript of the Regular Board Meeting of the Virgin Islands Public Services Commission at 124, 11.17-25; 125, 11.1-13 (Aug. 25, 2004) (stating that the VIPSC had adopted performance standards requiring Innovative to make quarterly reports, but that Innovative had failed to make those reports) (transcript excerpts attached as Exhibit 4).

⁷ *See Virgin Islands Telephone Corporation d/b/a Innovative Telephone, Innovative Long Distance, Inc., and Vitelco Cellular, Inc. d/b/a Innovative Wireless*, Order, 19 FCC Rcd 18535 (2004).

network (Innovative) and a fixed wireless network (Choice). Should Innovative's legacy landline network be damaged, Choice may be able to restore telephone service to the affected customers (and vice versa). Further, Choice's fixed wireless network will offer a broadband loop capability to all subscribers, both business and residential, thereby enabling more citizens in the USVI to have direct, cost-effective access to advanced telecommunications capabilities and information services in addition to local and long distance telephone service.

Contrary to Innovative's contentions, Choice's fixed wireless service is the only one of its kind in the USVI, and it is the only fixed service alternative to Innovative's current service. Choice's service package will be priced to compete aggressively with Innovative's offerings for both business and residential subscribers. Innovative wants the Commission to believe that the competitive entry posed by Choice is unlikely to actually occur, but the record in this proceeding demonstrates the opposite. In fact, Innovative has devoted so many resources to opposing Choice's entry before the VIPSC, and now before the Commission, because it knows that Choice is willing, able and ready to compete head-to-head with Innovative for business and residential subscribers in the USVI. If Innovative truly believed that Choice was not going to follow through on its commitments to offer competing services in the USVI, it would not be allocating such enormous resources over such a long period of time to fighting Choice's ETC request.

Choice has fully satisfied the ETC designation requirements, and is prepared and committed to offering quality telephone service to requesting consumers in the USVI. Choice first requested ETC status from the USVI regulator *over two and one-half years ago* in October 2002, and any further delay would only harm the interests of USVI consumers in more choices, better service, and lower prices. Choice respectfully requests the Commission proceed expeditiously and grant ETC status to Choice for the requested service territory in the USVI.

II. THE FCC SHOULD GRANT CHOICE'S PETITION WITHOUT DELAY

The oppositions have identified no valid basis for delaying consideration of the Petition by the Commission. Rather, these commenters argue that the Commission should suspend consideration of all ETC petitions pending consideration of the *Recommended Decision*⁸ of the Federal-State Joint Board on Universal Service ("Joint Board").⁹ The Commission repeatedly has found that this argument is misplaced in ETC application proceedings, because grant of any ETC petition, including Choice's Petition, will not influence the Joint Board's review of universal service support issues. Therefore, the Commission again should reject any arguments in favor of staying the Petition pending resolution of the Joint Board's recommended decision¹⁰ and implementation of any subsequent rules and requirements.

⁸ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, CC Docket No. 96-45, 19 FCC Rcd 10800 (2004); *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, 19 FCC Rcd 4257 (2004) ("*Recommended Decision*"). On February 28, 2005, the Commission issued a press release describing the adoption of a set of additional requirements for ETC proceedings. See "*FCC Adopts Additional Requirements for Eligible Telecommunications Carrier Proceedings*" (FCC 05-46) (rel. Feb. 28, 2005) ("ETC Additional Requirements Press Release"). As of the date of these reply comments, the text of this decision has not been released, and the additional requirements set forth in the press release are not yet effective.

⁹ Comments of the Virgin Islands Telephone Company d/b/a Innovative Telephone at 4-5 ("Innovative Comments"); see also Comments of Verizon telephone companies at 5-6 ("Verizon Comments"). The Commission also should reject Innovative's request to issue discovery to Choice. The Commission previously has not issued discovery to other ETC applicants, and the requests that Innovative proposes are unduly burdensome and unnecessary.

¹⁰ See *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners, Petition for Designation as an Eligible Telecommunications Carrier in the state of Alabama, the state of Florida, the state of Georgia, the state of New York, the Commonwealth of Pennsylvania, the state of Tennessee, and in the Commonwealth of Virginia*, Order, CC Docket No. 96-45, 19 FCC Rcd 16530, 16539-16540, ¶ 21 (2004) (declining to "delay ruling on pending ETC petitions and to impose additional requirement at this time.") ("*Nextel ETC Order*").

The Commission must decide ETC designation petitions on the rules as they currently exist,¹¹ and not on unsupported, vague speculation as to possible future harm to the Universal Service Fund (“USF”)¹² or possible rule changes.¹³ It is well established that the Commission must evaluate Choice’s Petition using the same standards as those applied to similarly situated ETC applicants,¹⁴ as modified by the additional criteria outlined in the *Virginia Cellular Order* and *Highland Cellular Order*.¹⁵ In fact, the United States Court of Appeals for the District of Columbia Circuit has long discouraged “disparate treatment” of “similarly situated parties.”¹⁶ Accordingly, the Commission must apply the current rules to its review of the pending Choice Petition.

The Commission’s *Virginia Cellular Order* sets forth many of the requirements that a petitioner must satisfy for ETC status. In establishing those standards, the Commission was aware of the important unresolved policy issues relating to Universal Service, but it determined that further delay in the consideration of ETC petitions was not in the public interest. Balancing the importance of moving to a decision on pending ETC petitions with the unresolved policy

¹¹ *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 79 (1st Cir. 1993) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (an agency’s decision cannot be supported based upon rules that the agency has not yet adopted); see also *CSRA Cablevision, Inc.*, 47 FCC 2d 572, ¶ 6 (1974) (“[u]nder the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.”).

¹² Innovative Comments at 24-25.

¹³ *Id.* at 4-5; Verizon Comments at 5-6.

¹⁴ See, e.g., *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

¹⁵ *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422 (2004) (“*Highland Cellular Order*”).

¹⁶ See *supra* note 14.

issues the Commission held, “[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission.”¹⁷ The Commission elaborated:

[W]e note that the outcome of the Commission’s pending proceeding before the Joint Board examining the rules relating to high-cost universal service support in competitive areas could potentially affect the support that Virginia Cellular and other ETCs may receive in the future. This Order is not intended to prejudge the outcome of that proceeding.¹⁸

Thus, it is clear that in the *Virginia Cellular Order*, the Commission rejected the approach Innovative and Verizon advance¹⁹ that possible future changes to the rules justify delaying consideration of Choice’s pending ETC request for designation as an ETC in the USVI. Rather, similar to the *Virginia Cellular* decision, and in particular in light of the substantial time that has elapsed since Choice first requested ETC status, the Commission should move forward and decide the pending Petition on the rules as they currently exist.

Verizon’s concerns regarding the impact of Choice’s designation on the regulatory regime established by the *CALLS Order*²⁰ are highly exaggerated.²¹ Choice is offering an alternative to Innovative’s service offerings, and it does not expect that many customers will subscribe to both Choice’s and Innovative’s competing offerings. As a result, designating

¹⁷ *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563, 1569, ¶ 12 (2004) (“*Virginia Cellular Order*”) 19 FCC Rcd at 1564, ¶ 3.

¹⁸ *Virginia Cellular Order*, 19 FCC Rcd at 1569, ¶ 12.

¹⁹ Innovative Comments at 4-5; Verizon Comments at 5-6.

²⁰ *Access Charge Reform*, Sixth Report and Order, CC Docket Nos. 96-262 and 94-1, Report and Order, CC Docket No. 99-249, Eleventh Report and Order, CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (subsequent history omitted) (“*CALLS Order*”).

²¹ Verizon Comments at 6.

Choice as an ETC will not put any significant new strain on the Universal Service Fund. The Commission previously has rejected this argument²² and should do so again in this instance.

Although the Commission has considered, and will continue to consider, broad policy issues when evaluating ETC designation petitions, it is critical that the Commission avoid making standards so strict that only the existing ILEC can hope to qualify as an ETC serving a market. Because Choice's ETC offerings are demonstrably in the public interest, delaying consideration of the Petition by the Commission prevents consumers in the USVI from receiving new services offered by Choice. Accordingly, public interest dictates that the Commission act swiftly in granting Choice's Petition.

III. THE COMMISSION SHOULD REJECT INNOVATIVE'S CLAIMS THAT CHOICE CANNOT PROVIDE SERVICE

Despite Choice's Petition and supporting affidavit stating that Choice provides, and is committed to providing, the supported services, Innovative takes issue with Choice's Petition on the ground that Choice does not currently have an interconnection agreement with Innovative. Choice has been seeking a reasonable interconnection agreement with Innovative for several years, and will enter into an interconnection agreement with Innovative after it receives ETC status from the Commission. Notably, Innovative does not deny that it is required by section 251 to enter into an interconnection agreement with Choice. Of course, Innovative has every incentive to delay entering into a reasonable interconnection agreement with Choice in order to support its argument that lack of such an agreement is a ground for rejecting Choice's Petition. This is classic bootstrapping. The Commission should not permit a rural ILEC to undermine

²² *Nextel ETC Order*, 19 FCC Rcd at 16540, ¶ 22 (noting the Commission's disagreement with Verizon's arguments that the Commission should not further designate any ETCs because it could have a significant impact on the access charge plan in the *CALLS Order*).

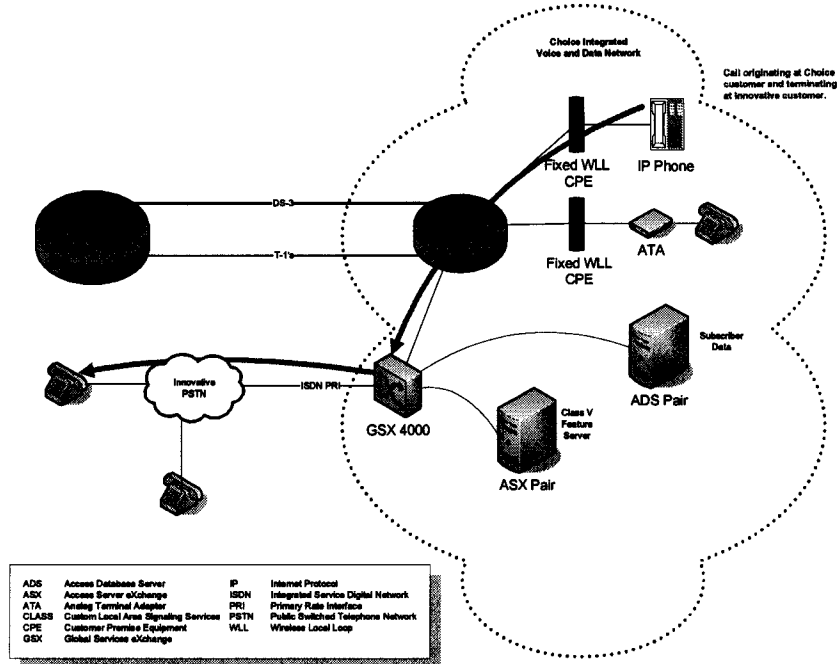
new entry by refusing to enter into a reasonable interconnection agreement, and it should accordingly reject this argument summarily.²³

In addition, contrary to Innovative's claims, Choice can and does provide telecommunications services to end-user customers. Below Choice demonstrates that it satisfies each of the requirements for ETC designation. To provide the services identified below, Choice will use and expand upon its existing fixed wireless network.²⁴ Fixed wireless services are a real solution to providing local telephone and other advanced services to customers, particularly in areas, such as the USVI, with a challenging terrain and topography. Using fixed wireless local loop technology, Choice will have the capability of originating calls from, and terminating calls to, its end-user subscribers. As one example, as illustrated below, to route a call from a customer served by Choice to a customer served by Innovative, the calling party will use a regular analog telephone (either wireline or wireless) in combination with customer premises equipment supplied by Choice to place the call over Choice's fixed wireless local loop. The call would be routed over Choice's fixed wireless network to a Choice switch, which will provide Class Functionality via instructions from the Class 5 feature server. The call then would be routed to Innovative for termination on the PSTN using an ISDN primary rate interface.²⁵

²³ Innovative cites to Jilapuhn Inc. as an example of a competitor in the USVI that has entered into an interconnection agreement with Innovative. Choice would note that this agreement requires Jilapuhn to purchase service from Innovative at a rate that is substantially higher than Innovative's own *retail* rate. This is not real competition. It is no wonder that Jilapuhn has no operations or fixed-line customers in the USVI at this time as verified via discussion by Steven J. Parrish to Jilapuhn representative on March 4, 2005. Affidavit of Steven J. Parrish, Chief Executive Officer, Choice Communications, LLC, ¶ 14 (Mar. 8, 2004) (provided as Exhibit 5).

²⁴ *Id.* ¶ 4.

²⁵ *Id.* ¶ 5.



A call from an Innovative customer to a Choice customer would be routed in the reverse direction in the same manner. Wireless local loop technology can be used effectively, efficiently, and reliably to route calls to and from Choice customers, and the Commission must reject Innovative's claim that Choice has not demonstrated that it will provide the supported services.

IV. CHOICE'S PETITION SATISFIES THE ETC DESIGNATION REQUIREMENTS

In its Petition, Choice satisfies the Commission's requirements for designation as an ETC and demonstrates that grant of the Petition is in the public interest. In its opposition to Choice's Petition, Innovative suggests that Choice must satisfy an extremely high burden to be designated

as an ETC.²⁶ Innovative overstates the burden imposed on the ETC applicant. To obtain designation as an ETC in an area served by a rural carrier, in addition to demonstrating that Choice provides the supported services using its own facilities and will advertise those supported services, Choice must demonstrate that granting it ETC designation is in the public interest.²⁷ However, once Choice presents evidence showing that the public interest supports grant of the application, it has met its burden of proof. There is no additional or heightened burden that Choice must satisfy in order to justify grant of its application. When Congress adopted the Telecommunications Act of 1996, it did not mean to prevent all competitive entry into rural areas, as Innovative seems to believe.

Furthermore, as noted above, Innovative is a “rural telephone company” in name only. It is the largest privately held independent ILEC in the United States, and it enjoys the status as a rural telephone company due solely to the number of lines in the USVI (approximately 70,000). In contrast, for video-programming purposes, which examines population density to determine if the market should be classified as a rural market, the USVI is not classified as a rural area because it is densely populated. Hence, even if it made sense to impose a higher burden of proof to protect small rural telephone companies with vulnerable operations in high-cost areas, Innovative neither requires nor deserves such protection. In any event, Choice believes that it offers a compelling rationale for granting its Petition, and that it satisfies even the most rigorous burden of proof for granting ETC status in rural areas.

Choice already has satisfied the criteria for ETC designation. Specifically, Choice explained how it provides or will provide the services and functionalities in the USVI supported by the federal universal service program, outlined in section 54.101(a) of the Commission’s

²⁶ See Innovative Comments at 2 (stating that “Choices faces a high burden of proof...”).

²⁷ 47 U.S.C. § 214(e)(2).

rules.²⁸ Choice satisfied each of the elements required for ETC designation under section 214(e)(6) of the Communications Act of 1934, as amended (the “Act”).²⁹ Choice demonstrated that it meets the additional conditions established in the *Virginia Cellular Order*.³⁰ In addition, Choice provided declarations indicating with specificity the services it provides or will provide after receiving ETC status and confirmed its intent to use available funds for only the permitted purposes.³¹ As such, Choice meets the prerequisite conditions for designation as an ETC and respectfully requests that the Commission grant the Petition immediately.

A. CHOICE IS A COMMON CARRIER

In a weak attempt to divert the Commission’s attention, Innovative claims “Choice’s Application appears to gloss over this initial prerequisite [of establishing common carrier qualification] and focuses instead on the supported services, commitments, and advertising requirements.”³² This assertion is a fallacy; Choice is a common carrier. Choice holds a Section 214 authorization from the FCC, which is available only to common carriers. Choice also holds several wireless licenses issued by the Commission. Section 332(c)(1) explicitly provides that CMRS carriers satisfy the definition of a common carrier, and Choice today provides CMRS services.³³ Furthermore, contrary to Innovative’s claim,³⁴ Choice files the FCC Forms 499A and

²⁸ 47 C.F.R. § 54.101(a). The Commission has identified the following services and functionalities as the core services to be offered by an ETC and supported by federal universal service support mechanisms: (1) Voice grade access to the public switched network; (2) Local usage; (3) Dual tone multi-frequency signaling or its functional equivalent; (4) Single-party service or its functional equivalent; (5) Access to emergency services; (6) Access to operator services; (7) Access to interexchange service; (8) Access to directory assistance; and (9) Toll limitation for qualifying low-income consumers.

²⁹ 47 U.S.C. § 214(e)(6).

³⁰ Choice Petition at 22-24.

³¹ *Id.* at 2.

³² Innovative Comments at 6.

³³ 47 U.S.C. § 332(c)(1).

³⁴ Innovative Comments at 6, n.15.

499Q as a common carrier, and it contributes to the federal universal service fund and pays other federal fees based on those reports. In any event, no party denies that Choice will operate as a common carrier when it provides the supported services after receiving ETC status, thereby satisfying the “common carrier” requirement. As such, the Commission should not deny Choice’s Petition based on Innovative’s flawed “common carrier” assertion.

B. CHOICE’S PETITION SATISFIES ALL OF THE REQUIREMENTS FOR DESIGNATION AS AN ETC

The requirements for designation as an ETC are well established by the Commission. ETC petitioners are required to demonstrate that they comply with the requirements outlined in section 214(e)(6) of the Act, the *Twelfth Report and Order*,³⁵ the Commission’s *Virginia Cellular* and *Highland Cellular* orders, and demonstrate that they provide or will provide the services and perform or will perform the functionalities described in section 54.101(a) of the Commission’s rules. There is no legal or public policy justification for discriminating against Choice by imposing unique or additional requirements. Choice has satisfied all of the requirements outlined in section 214(e)(6) of the Act, section 54.101(a) of the Commission’s rules, the *Twelfth Report and Order*, the *Virginia Cellular Order*, and the *Highland Cellular Order*. Therefore, the Commission should promptly designate Choice as an ETC in the requested areas in the USVI.

³⁵ *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved Areas, Included Tribal and Insular Areas*, CC Docket No. 96-45, *Twelfth Report and Order*, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (“*Twelfth Report and Order*”).

1. Choice provides or will provide the supported services

Commission precedent does not require an ETC petitioner to demonstrate it provides all of the service throughout the entire designation service area prior to ETC designation status.³⁶ Innovative argues that designation is inappropriate because Choice is not currently providing all services throughout the designated area.³⁷ Similarly, Innovative claims that the Commission should deny Choice's Petition because it appears that Choice's actual service area is not currently as extensive as its licensed service area.³⁸ Of course, Innovative knows that if an entity must first provide all the supported services before applying for ETC status, it is unlikely that any entity would ever seek to compete against Innovative's legacy landline business in the USVI. A new entrant needs to receive ETC status before it makes 100% of the investments necessary to provide all the supported services in order to construct a viable business case for new entry at all.

Innovative also misstates the evidentiary record when it states that Choice currently provides no supported services. Choice presently provides several USF-supported services in the USVI. Further, Choice currently is implementing a program to expand its network such that it can provide all supported services to a larger USVI population. In particular, after it is designated as an ETC, Choice will use its fixed wireless local loop and transport network, in

³⁶ *Virginia Cellular Order*, 19 FCC Rcd at 1573, ¶ 23 (noting that Commission has already determined that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC); *see also Nextel ETC Order*, 19 FCC Rcd at 16539, ¶ 19 (citing *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168, 15175, ¶ 17 (2000)) (noting that a carrier's inability to demonstrate that it can provide ubiquitous service at the time of designation does not preclude such designation).

³⁷ Innovative Comments at 7; Verizon Comments at 2.

³⁸ Innovative Comments at 29.

combination with the necessary switching capabilities, to route calls to and from Choice customers. USF support would assist Choice not only to provide the USF supported services to the citizens of the USVI, but also to build out and improve its system throughout the designated areas.

a. Innovative's claims regarding Choice's lack of universal service support service offerings are meritless

In its comments, Innovative is mistaken about Choice's service offerings in the USVI, stating incorrectly that Choice provides no eligible services.³⁹ As stated above, the Commission does not require the applicant to show that it actually provides the services eligible for universal service support at the time of ETC designation. The Commission requires demonstration that the petitioner is willing and able to provide the services enumerated in the Commission's rules.⁴⁰ Further, as indicated in its Petition, Choice currently does provide certain services eligible for universal service support in portions of the USVI using its existing wireless network. For example, Choice currently offers single-party service, and Choice is able to grow its capabilities to meet customer demand. With additional USF support, Choice will be able to further expand and enhance these offerings throughout the USVI.

(1) *Choice provides single-party service*

In its Petition, Choice committed to providing single-party service if it is designated as an ETC. Indeed, in its Petition, Choice demonstrated that it already is capable of providing single-party service, and that it currently provides single-party service to a customer on Little St. James

³⁹ *Id.* at 9.

⁴⁰ *Virginia Cellular Order*, 19 FCC Rcd at 1573, ¶ 23.

Island.⁴¹ If designated as an ETC, then Choice will make its services more broadly available, and will do so providing single-party service.

In its opposition, Innovative attached an affidavit in which it claims that it contacted Choice to obtain fixed wireless telephone service. Historically, Choice has provided the requested services as an accommodation to customers that could not otherwise obtain telephone service. In other words, Choice has provided service to those customers to whom Innovative could not (or would not) provide service, such as the customer on Little St. James Island.⁴² Due to the topography of the USVI and the type of equipment that Choice has in place, its ability to provide mass market services, such as what the affiant claims to have requested, has been limited until now. However, with the installation of new equipment and Choice's continued development, Choice now has the capability to provide its wireless services on a much broader scale. As Choice continues to grow and expand, it will work with its employees to ensure that they have up-to-date information about the services that Choice is willing and able to provide.

(2) *Choice will provide voice grade access to the PSTN*

As universal service support should “neither unfairly favor nor disfavor one technology over another,”⁴³ the Commission should reject Innovative's argument that Choice's Petition is deficient because Choice intends to use broadband technologies and applications to offer voice-grade access to the PSTN.⁴⁴ Choice's use of broadband technologies will provide citizens of the USVI with access to the PSTN, enabling “traditional” local voice grade services as well as

⁴¹ Choice Petition at 11.

⁴² See Parrish Aff. ¶ 7.

⁴³ See *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Providing by Western Wireless in Kansas is Subject to Regulation as a Local Exchange Service*, 17 FCC Rcd 14802, 14816, ¶ 24 (2002). Furthermore, it is irrelevant whether the carrier provides the services using fixed or mobile technology. See *id.*

⁴⁴ Innovative Comments at 11-13.

access to much needed advanced services. Currently, citizens in the USVI have severely limited access to not only quality plain old telephone service (“POTS”) but also to advanced telecommunications services and capabilities.⁴⁵ Designating Choice an ETC in the USVI will provide access to much-needed telecommunications advancements, encourage competition, and provide for a real choice in the telecommunications market.

(3) Choice will provide DTMF signaling or its functional equivalent

As indicated in its Petition, and supported by the service declaration attached thereto, upon designation as an ETC in the USVI,⁴⁶ Choice commits to provide DTMF signaling or its functional equivalent in the USVI. Innovative’s claim that Choice should provide actual plans or cost estimates for installing a switch are ill founded.⁴⁷ Nothing in the Commission’s rules requires an ETC petitioner to make such a demonstration. Choice’s express commitment is sufficient to satisfy this eligibility criterion. Choice also notes that its decision to spend \$30 million on system improvements demonstrates that its commitment to make the investments necessary to provide the supported services is legitimate.

(4) Choice will provide access to emergency services

There is no merit to Innovative’s claim that Choice does not provide 911 service. As stated in its Petition, Choice currently provides its local customers with access to “911” service through the PSTN, which permits the customer to access emergency services from its Choice SMR handset.⁴⁸ Further, Choice has made a specific commitment to provide 911 service to its customers, and hence Choice has satisfied this criterion. It should be noted that E911 service is

⁴⁵ See *supra* note 4 (citing complaints about Innovative’s telephone service).

⁴⁶ Choice Petition at 11-12, Exh. 2.

⁴⁷ Innovative Comments at 13.

⁴⁸ Choice Petition at 12.

not available in the USVI, and the Commission has designated other wireless providers as ETCs despite not provisioning E911 service.⁴⁹

(5) *Choice will provide Access to Operator Services and Directory Assistance*

As indicated in its Petition, Choice currently provides a version of both operator services and directory assistance through the availability of such information from its ISP help desk technicians.⁵⁰ There is no requirement in the Commission's rules that Choice provide access to these services in a specific manner or method; in fact, the competitive neutrality principles behind universal service support would be contradicted if the Commission imposed such a requirement. Furthermore, these services are readily available in the marketplace, and it will be rather expedient to obtain the necessary service such that Choice can provide these services to its own end users.

(6) *Choice will provide access to IXC services and local usage*

As indicated in its Petition, after receiving ETC designation, Choice commits to using its fixed wireless network, as well as broadband applications and technologies, to provide citizens of the USVI with access to IXC services and local usage.⁵¹ It is irrelevant, as Innovative asserts, that a Hearing Examiner for the VIPSC concluded that Choice did not offer access to interexchange services at that time.⁵² The Commission does not require that petitioners for ETC designation provide all of the supported services at the time of designation, rather, petitioners

⁴⁹ See, e.g., *Federal-State Joint Board on Universal Service; Guam Cellular and Paging, Inc. d/b/a Guamcell Communications Petition for Designation as an Eligible Telecommunications Carrier in the Territory of Guam*, 17 FCC Rcd 1502 (2002) (designating Guam Cellular and Paging, Inc. ("Guamcell") as an ETC, even though Guamcell provided no E911 service to its subscribers).

⁵⁰ Choice Petition at 13.

⁵¹ *Id.*

⁵² Innovative Comments at 15 (citing *VIPSC ETC Order* at 1-2 (Ex. 4); *Hearing Examiner Interim Decision* at A5 (Ex. 3)).

must demonstrate that they are willing to do so upon designation.⁵³ In this case, Choice is in the final stages of negotiating the arrangements necessary to offer access to interexchange services in the USVI, and Choice could begin providing service as early as April 2005.⁵⁴ Hence, Choice easily satisfies this criterion.

(7) *Choice will provide toll limitation for qualifying low-income customers*

As with all of the requirements under section 54.101(a) of the Commission's rules for designation as an ETC, Innovative again confuses the issue of what a petitioner for ETC designation is required to demonstrate, asking the Commission to deny Choice's Petition because Choice is neither currently providing toll blocking nor does it appear from Innovative's analysis, it will be able to provide the service.⁵⁵ Innovative conveniently ignores Choice's express voluntary commitment to do so upon designation. Choice will provide all Life Line and other required services, and the switch that Choice has selected for its fixed wireless network is easily capable of supporting such offerings.

b. *Choice will advertise the supported services*

In its Petition, Choice committed to advertising the supported services. Choice already has advertised in media of general distribution various services that it provides, and easily will be able to advertise the supported services if designated as an ETC. There is no basis to doubt Choice's commitment as Innovative suggests,⁵⁶ or to obtain a further commitment of any sort.

⁵³ *Virginia Cellular Order*, 19 FCC Rcd at 1573, ¶ 23; *see also Nextel ETC Order*, 19 FCC Rcd at 16539, ¶ 19 (citing *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168, 15175, ¶ 17 (2000)) (noting that a carrier's inability to demonstrate that it can provide ubiquitous service at the time of designation does not preclude such designation).

⁵⁴ *See Parrish Aff.* ¶ 13.

⁵⁵ Innovative Comments at 15-16.

⁵⁶ *Id.* at 19.

c. Verizon's reseller argument is irrelevant

Choice's Petition demonstrates that Choice will provide eligible services through "a combination of its own facilities and the facilities of another carrier."⁵⁷ Section 214(e)(1)(A) of the Act requires that a common carrier designated as an ETC provide services supported by the Federal Universal Service support mechanisms using either its own facilities or a combination of its own facilities and resale of another carrier's services.⁵⁸ As such, Verizon's argument that Choice cannot receive ETC designation as a pure reseller⁵⁹ incorrectly interprets the way Choice provisions services in the USVI. This may flow from the fact that Verizon has no presence in the USVI.

Further, Verizon is incorrect in asserting that by virtue of providing even a portion of its services as a reseller, Choice should be ineligible for any universal service support even when it uses its own facilities to provide service. As the Commission is aware, there are no "minimum facilities" that a carrier must own to qualify for universal service support as a partial reseller. Carriers that provide some of their services by resale may qualify for and receive universal service support to the extent they use their own facilities, in whole or in combination with the facilities of other carriers, to provide service to customers. Consistent with the Commission's rules, Choice will seek universal service support only for those customers that it serves using its own facilities or a combination of its own facilities and the facilities of another carrier. Due to the unique and difficult topography of the USVI, some customer locations cannot be served by wireless providers even with the most sophisticated access nodes. (Similarly, Innovative, the only ETC in the USVI today, is not able to serve certain customers from its landline network due

⁵⁷ Choice Petition at 7.

⁵⁸ 47 U.S.C. § 214(e)(1)(A).

⁵⁹ Verizon Comments at 3.

to topographical and terrain barriers.) In those locations where Choice is unable to serve customers using its wireless network, it will seek to serve those customers through resale where possible.⁶⁰ Hence, Choice satisfies the requirement that it may not receive universal service support except where it uses its own facilities or a combination of its own facilities and the facilities of another carrier.

- d. Verizon's concerns regarding VoIP/Broadband services are not appropriate in this proceeding

The Commission has long held that the universal service support mechanisms and rules are premised on the principle of "competitive neutrality"⁶¹ The principle of competitive neutrality includes technological neutrality: a carrier may be designated as an ETC regardless of the technology that it uses to provide the supported services.⁶² The Commission must decide ETC designation petitions on the rules as they currently exist⁶³ and not on unsupported, vague

⁶⁰ In its comments, Innovative took issue with Choice's decision not to request a study area waiver, claiming that choice previously stated that its service area was not equivalent to Innovative's study area. *See* Innovative Comments at 30, 131. Choice acknowledges that its footnote in the interrogatory response to which Innovative cites is not artfully worded. It is Choice's understanding that its licensed service area is comparable to Innovative's study area, but it has been unable to locate a definitive map of Innovative's study area for comparison purposes. There could be areas of Innovative's study area, however, that Choice is unable to serve due to, for example, topographical and terrain issues. Therefore, if necessary under the Commission's interpretation of applicable statutory requirements and agency rules, and only to the extent it is necessary, Choice requests a waiver of the study area to exclude those limited areas in the USVI where Choice cannot serve subscribers due to topographical and/or terrain barriers. Choice can specify the geographical boundaries of the requested waiver upon request from the Commission.

⁶¹ *Report and Order*, 12 FCC Rcd at 8801, ¶ 47.

⁶² *See, e.g., id.* at 8850, ¶ 133.

⁶³ *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 79 (1st Cir. 1993) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (an agency's decision cannot be supported based upon rules that the agency has not yet adopted); *see also CSRA Cablevision, Inc.*, 47 FCC 2d 572, ¶ 6 (1974) ("[u]nder the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.").

speculation as to the possible outcome of the Commission's pending VoIP proceedings⁶⁴ and their possible applicability on ETC designation actions.

The Commission has the authority to designate any carrier, including a fixed wireless carrier using its existing network and its unique service applications as an ETC as long as it satisfies the eligibility criteria.⁶⁵ As demonstrated in the Petition, Choice's provision of the required services through a fixed wireless network that also offers broadband capabilities to subscribers does not preclude the Commission from designating Choice as an ETC. Verizon's concerns regarding VoIP applications in ETC proceedings and the use of broadband applications to provision USF-supported services are irrelevant. Certainly, it cannot be Verizon's position that a carrier is precluded from ETC status simply because it uses IP routing at some point or in some manner in the provision of services to end-user subscribers.

2. Choice is committed to provide service within a reasonable timeframe

In its comments, Innovative contends that the Commission should require Choice to commit to provide eligible services to requesting customers within a specific timeframe.⁶⁶ Although applicable law requires that a carrier furnish "communication service upon reasonable request,"⁶⁷ nowhere in the Commission's rules is there a requirement for ETCs to provide service within any specific timeframes. Therefore, it would be inappropriate for the Commission to delay or deny designation of Choice as an ETC on this basis, or to impose this requirement solely on Choice as a condition for granting its Petition. Although Choice strongly disagrees with

⁶⁴ Verizon Comments at 4.

⁶⁵ *See Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Providing by Western Wireless in Kansas is Subject to Regulation as a Local Exchange Service*, 17 FCC Rcd 14802, 14816, ¶ 24 (2002). Furthermore, it is irrelevant whether the carrier provides the services using fixed or mobile technology. *See id.*

⁶⁶ Innovative Comments at 17.

⁶⁷ 47 U.S.C. § 201(a).

Innovative's contention, Choice would note that it presently is implementing an expansion program for its wireless network and that it has constructed an internal business plan for offering eligible services to USVI subscribers.⁶⁸ While Choice does not wish to share this sensitive information with Innovative for obvious competitive reasons, Choice would be willing to share this information with the Commission upon request should the Commission require this information in order to fully consider Choice's Petition.

3. Choice is committed to providing universal service to customers upon a reasonable request in compliance with the *Virginia Cellular Order*

Applicable law requires that a carrier furnish "communication service upon reasonable request"⁶⁹ within the areas for which it seeks designation as an ETC. The law does not require an ETC to expend unlimited resources to serve every single customer.⁷⁰ In its Petition, Choice committed to a six-step service evaluation process for customers requesting service that is within Choice's designated service area but outside the existing coverage of Choice's network. The Commission has already granted ETC designations based on the same representations Choice enumerated for provisioning service in compliance with the *Virginia Cellular Order*⁷¹ and should do so again in this instance.

In addition, Choice has represented that it will comply with the Commission's ETC designation requirements, including the public interest requirements set forth in the *Virginia Cellular Order*.⁷² If designated, Choice has agreed to comply with the CTIA Consumer Code, to

⁶⁸ Parrish Aff. ¶ 8.

⁶⁹ 47 U.S.C. § 201(a).

⁷⁰ Indeed, in its comments, Innovative notes that it provides service to customers "where technically feasible," thus indicating that it does not serve every potential customer in the USVI. *See* Innovative Comments at 3.

⁷¹ *See Nextel ETC Order*, 19 FCC Rcd at 1568, ¶ 11; *see also PSC ETC Order* ¶ 18.

⁷² Choice Petition at 16.

submit annual reports regarding the number of consumer complaints and the number of unfulfilled requests for service issued, and to comply with any applicable consumer protection requirements imposed by the Commission.⁷³ Choice reiterates its commitment to provide, as part of its universal service offering, all services supported by the universal service mechanism, including minimum local usage requirements.⁷⁴ In recent decisions, the Commission has held that these additional commitments are “reasonable and consistent with the public interest and the Act and the Fifth Circuit decision in *Texas Office of Public Utility Counsel v. FCC*” and has declined to impose additional requirements on ETC applicants.⁷⁵

4. Choice is committed to improving its facilities

The Commission should reject Innovative’s claim that Choice must submit a detailed expansion plan to be eligible to be designated as an ETC.⁷⁶ As an initial matter, Choice is in the process of deploying additional new access nodes in the USVI, which will provide Choice with increased coverage throughout the USVI.⁷⁷ Choice has committed to build out its network to reach a broader customer base.⁷⁸ Beyond this commitment, the Commission does not require

⁷³ *Id.* at 22-24.

⁷⁴ Choice Petition at 13.

⁷⁵ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-418 (5th Cir. 1999); *see Nextel ETC Order*, 19 FCC Rcd at 16542, ¶ 25 (holding Nextel’s additional commitments to give progress reports on build-outs, report on the number of complaints per 1000 handsets in service, and report the number of unfulfilled requests for service in the public interest but declining to impose additional requirements); *see also Federal-State Joint Board on Universal Service, Public Service Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the States of Georgia and Alabama*, Order, CC Docket No. 96-45, DA 05-259 at ¶ 39 (rel. Jan. 31, 2005) (“PSC ETC Order”) (holding PSC’s additional commitments to comply with the CTIA Consumer Code, report on the number of complaints per 1000 handsets in service, and report the number of unfulfilled requests for service in the public interest but declining to impose additional requirements).

⁷⁶ Innovative Comments at 16.

⁷⁷ *See Parrish Aff.* ¶ 8.

⁷⁸ *Id.*

Choice to publicly disclose detailed build-out plans to its principal competitor in order to demonstrate its commitment to provide quality service throughout the designated service area as a prerequisite for ETC designation. Nothing in the *Virginia Cellular Order* requires that an applicant begin construction, or submit binding plans for construction, in order to obtain ETC designation. Nor should the Commission adopt such a requirement. It is unrealistic to expect an applicant to submit binding construction plans prior to applying for ETC status, particularly given that the purpose of ETC funding is to ensure the build-out of quality, affordable services.⁷⁹

It should be noted that Innovative would be the chief, and perhaps only, beneficiary of the additional detail that Innovative claims is lacking in Choice's Petition. Innovative is concerned that Choice will provide strong competition for subscribers in the USVI, and it desires as much information as possible about Choice's plans so that it may take whatever actions it can to defend its market position and thwart Choice's new entry. For example, based on this sensitive information, Innovative could seek to engage in preemptive price reductions targeted to those customers whom Choice intends to serve first, with such price cuts being funded by Innovative's current universal service subsidies and tax breaks. Innovative could use this information to take various other actions that are designed to minimize Choice's ability to obtain new customers.⁸⁰ Choice is committed to making the investments necessary to provide the supported services throughout the USVI, and, as noted above, Choice is willing to share its business plan and build-out timeline with Commission staff so long as such sensitive information is protected against public disclosure. Choice always has followed the principle in its existing

⁷⁹ 47 U.S.C. § 254.

⁸⁰ Choice's reluctance to provide this information to the public, and Innovative, in particular, is not based on idle speculation. In Choice's experience, for example, in the video market, Innovative has a history of matching each of Choice's promotions with an identical promotion of its own. This behavior demonstrates that Innovative is quite capable of targeted price reductions or other tactics designed solely to undermine the competitive position of a rival provider.

businesses that a strong customer-oriented approach is the key to sustainable market growth, and, consistent with that approach, Choice will build out and expand its market as customers demand.

C. THERE WILL BE NO HARM TO THE USF BY DESIGNATING CHOICE AS AN ETC

Innovative asserts that the Commission should deny Choice's Petition based on the possibility of potential dilution of the amount of support available to ILECs (*i.e.*, Innovative).⁸¹ The Commission repeatedly has rejected these types of speculative funding arguments as being beyond the scope of an individual ETC designation proceeding and should do so again here. Indeed, in the *Virginia Cellular Order*, the Commission observed that the impact of any one competitive ETC is, at best, inconclusive and that the appropriate forum to address any funding concerns is in the ongoing *Portability* proceeding.⁸² Innovative does not provide sufficient data to support its claims. Innovative does not demonstrate any harm to its ability to compete with Choice for the provision of service, or that Choice's designation will compromise its ability to continue serving as an ETC. The Commission has repeatedly recognized that a party opposing ETC designations bears the burden of supporting such claims with specific evidence and cannot merely rely on unsubstantiated assertions.⁸³

⁸¹ Innovative Comments at 24-25.

⁸² *Virginia Cellular Order*, 19 FCC Rcd at 1577, ¶ 31 (citing to *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307 (2002)) ("*Referral Order*"); *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High Cost Universal Service Support and the ETC Process*, Public Notice, CC Docket 96-45, 18 FCC Rcd 1941 (2003)).

⁸³ *See Federal-State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama*, Memorandum Opinion and Order, CC Docket No. 96-45, 17 FCC Rcd 23532, 23542, ¶ 26 (2002) (holding that "[t]he parties opposing this designation have not presented persuasive evidence to support their contention that designation of an additional ETC in the rural areas at issue will reduce investment in infrastructure, raise rates, reduce service quality to consumers in rural areas or result in loss of network efficiency.").

1. Choice's designation as an ETC will have minimal impact on USF

As explained above, designating Choice as an ETC will have a minimal impact on the universal service fund. By offering a fixed wireless local loop service, Choice is offering a fixed alternative to Innovative's service. As such, unlike cellular service, customers likely would purchase Choice's service as an alternative—not in addition to—Innovative's service. Designating Choice as an ETC would have a small impact on USF to the extent that Choice provides service to customers that were not previously served by Innovative.

2. The presence of other wireless carriers does not impact the USF

Innovative asserts that the Commission should deny the Petition because there are already other mobile wireless carriers serving the same area and as such, Choice does not need access to universal service support for the provision of services.⁸⁴ Choice is not disqualified from receiving ETC status merely because other providers serve the area. In fact, the Commission has repeatedly rejected claims that designations of multiple ETCs is not in the public interest, noting that "competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers."⁸⁵ As noted by the Commission in its *Nextel ETC Order*:

[a]lthough Nextel and other CMRS operators may already offer service in the subject markets, designating Nextel as an ETC will further the Commission's universal service goals by enabling Nextel to better expand and improve its network to serve a greater

⁸⁴ Innovative Comments at 23-24.

⁸⁵ *Federal-State Joint Board on Universal Service, Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Memorandum Opinion and Order, Docket No. 96-45, 16 FCC Rcd 48, 57, ¶ 22 (2000), *aff'd*, 16 FCC Rcd 19144 (2001) ("*Western Wireless Wyoming ETC Order*") (finding "no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural area.").

population and increase competitive choice for customers within the study areas of its ETC designation.⁸⁶

Innovative's claim that the USVI telephony market is characterized by vibrant new entry is utter nonsense. Apart from Choice, the only real competitive providers of telecommunications services are the cellular telephone carriers that offer spotty coverage at best. The Commission has consistently held that the CMRS market is separate and distinct from the landline telephone market.⁸⁷ Choice plans to compete against Innovative for its landline customers in a way that cellular telephone carriers cannot. No other carriers offer such competition in the USVI today. The one entity mentioned by Innovative—Jilapuhn Inc. d/b/a Caribbean Telecom—is not a functioning carrier today in the USVI. Choice contacted Jilapuhn to learn more about its telecommunications service and was told that Jilapuhn does not currently offer voice service in the USVI.⁸⁸ Nor, as noted above, is it likely that Jilapuhn will be able to offer resale service if it is forced to buy service from Innovative at wholesale rates that are higher than Innovative's retail rates.

The reality in the USVI is that Innovative receives substantial universal service subsidies, among other benefits, today and it is infeasible for any new fixed services entrant to compete against Innovative's service unless it also qualifies to receive universal service support.⁸⁹ It is

⁸⁶ *Nextel ETC Order*, 19 FCC Rcd at 16539, ¶ 20.

⁸⁷ *See, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Memorandum Opinion and Order, FCC 04-255, ¶¶ 239-41 (rel. Oct. 26, 2004) (stating that the wireless and wireline markets are distinct from one another).

⁸⁸ Parrish Aff. 14.

⁸⁹ *See, e.g., Universal Service Administrative Company, 2002 Annual Report, High Cost Support by State*, Appendix B at 27 (listing the total high-cost support by state and stating that the total support for the U.S. Virgin Islands during 2002 was \$31,792,000); *Universal Service Administrative Company, 2003 Annual Report, High Cost Support by State*, Appendix B at 27 (listing the 2003 high-cost support for the U.S. Virgin Islands as \$30,176,000).

now nearly ten years after adoption of the Telecommunications Act of 1996, and USVI subscribers are still waiting to see *any* benefits in the form of more choices, better service or lower prices. To the contrary, there is still only one available carrier (the incumbent) for fixed-loop services, and Innovative's service has gotten progressively worse while its prices have gotten progressively higher.⁹⁰ Designating Choice as an ETC will facilitate competition in the provision of universal service, bringing consumers in the USVI new telecommunications services, promoting rapid development of new technologies in those areas.

D. CHOICE WILL NOT AND CANNOT CREAM-SKIM

Contrary to Innovative's claims,⁹¹ Choice will not and cannot cream-skim in the USVI. Choice's licensed service area is comparable, if not identical, to Innovative's service area. While the Commission agrees that it is unrealistic to expect a new entrant to finalize business plans without having some assurance that it will become eligible to receive universal service support, the potential for cream-skimming arises in those situations where a competitive carrier seeks to serve only a portion of a rural telephony company's study area.⁹² Indeed, the Joint Board originally recommended retention of the study area as a rural telephone company's ETC service area to minimize the risk that a competitor would seek to serve only the lowest cost portions of the rural telephone company's service area, the Commission agreed.⁹³ However, this is not the case in this instance. Choice has committed to take the steps necessary to maximize its ability to provide service to any requesting customer within its licensed service area. Moreover, because Choice will rely primarily on its existing and expanding fixed wireless network to offer service,

⁹⁰ See *supra* note 2.

⁹¹ Innovative Comments at 31-33.

⁹² *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corp., Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168, 15173, ¶ 13 (2000).

⁹³ *Report and Order*, 12 FCC Rcd at 8881-82, ¶ 189.

Choice will be able to serve high-cost areas that are not economic to serve using aerial or trenched plant. As a result, Choice is not attempting to cream-skim low-cost areas while avoiding service to high-cost areas in rural exchanges or study areas of the USVI.

Nonetheless, even if Choice's current service coverage area did not encompass Innovative's entire service area, there are other methods by which carriers such as Innovative could minimize the opportunity for such cream-skimming. The Commission has offered rural telephone companies like Innovative the option to "disaggregate" the federal universal service support amounts they receive to the higher-cost portions of their study areas. Thus the risk of cream-skimming in instances where the ETC designation petitioner serves an area less than the entire study area has been eliminated because the incumbent ETC can utilize the disaggregation process to target its federal universal service support to better reflect the actual costs of serving different areas throughout its study area.⁹⁴

V. GRANTING CHOICE'S PETITION SERVES THE PUBLIC INTEREST

The Commission should find that Choice has satisfied the statutory prerequisites set forth in section 214(e)(1) of the Act⁹⁵ as well as the Commission's considerations outlined in its

⁹⁴ *In the Matter of Federal-State Joint Board on Universal Service Petitions for Reconsideration of Western Wireless Corp.'s Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Order on Reconsideration, CC Docket No. 96-45, 16 FCC Rcd 19144, 19149, ¶ 12 (2001) ("rural telephone companies, however, now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. Therefore, any concerns regarding "cream-skimming" of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated." (emphasis supplied)).

⁹⁵ 47 U.S.C. § 214(e)(1).

Virginia Cellular Order and *Highland Cellular Order*.⁹⁶ Consistent with public interest standard for rural service areas, grant of the Petition will manifestly serve the public interest. Designation of Choice as an ETC will allow Choice to provide a valuable competitive alternative to the incumbent, benefiting consumers in the USVI.

One of the principal goals of the Telecommunications Act of 1996 is to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”⁹⁷ Designation of a fixed wireless provider promotes the goals of the Act and provides unique benefits to consumers. The Commission has long acknowledged the benefits of designating wireless providers as ETCs, concluding that designation “promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies.”⁹⁸

A. THERE IS NO MEANINGFUL COMPETITION IN THE USVI

As Innovative’s CEO already has admitted, there is no competition in the telecommunications market in the USVI.⁹⁹ The reason is clear. As noted above, it is not economically feasible for carriers to enter the local telephone market in the USVI without universal support – a fact that Innovative itself acknowledges, despite making contrary statements to the FCC in this proceeding.¹⁰⁰ Absent ETC designation, it would not be possible to provide competing services in the USVI. The USVI market, which is characterized by a

⁹⁶ *Virginia Cellular Order*, 19 FCC Rcd at 1575, ¶ 27; *Highland Cellular Order*, 19 FCC Rcd at 6431-32, ¶ 21.

⁹⁷ Telecommunications Act of 1996, Pub. Law No. 104-104, 100 Stat. 56 (1996).

⁹⁸ *Western Wireless Wyoming ETC Order*, 16 FCC Rcd at 55, ¶ 17.

⁹⁹ *See supra* note 2.

¹⁰⁰ *See id.*

relatively small population and challenging terrain and climatic conditions, makes entry difficult. Furthermore, there are not any geographically adjacent regions where a carrier could introduce services with plans to expand those services into the USVI.

The carriers that Innovative cites in its comments do not provide services that compete head-to-head with Innovative's legacy wireline service. As stated above, the one carrier Innovative points to as offering a directly competitive service—Jilaphun—does not provide any service in the USVI today.

Granting Choice's application also is in the public interest because it will ensure a more robust telecommunications infrastructure in the USVI. As stated above, Choice offers (or will offer) services using a state-of-the-art fixed wireless network. This network will offer additional protection against loss of service. For example, if a hurricane were to destroy telecommunications plant, it would be beneficial to have both a wireline network and a fixed wireless network to prevent total loss of service. Furthermore, contrary to Innovative's arguments, Choice's service is unique in the USVI. Choice's service is the only fixed loop alternative to Innovative's current service. In addition, Choice's service is offered using only licensed spectrum. In contrast, wireless data providers in the USVI operate primarily in unlicensed spectrum, which is subject to substantial interference and, therefore, poor service. Accordingly, Choice's product is unique in the marketplace.

B. GRANTING THE PETITION BRINGS BENEFITS OF COMPETITION TO AN UNDERSERVED MARKETPLACE

In its opposition, Verizon invited Choice to demonstrate that consumers in the USVI are underserved and obtain sub-par telephone service.¹⁰¹ The telecommunications market in the USVI is dominated by a single, incumbent provider, Innovative. As a result, Innovative does not

¹⁰¹ Verizon Comments at 5.

have any incentive to enhance its service offerings or to provide quality service to its customers. As discussed above, consumers wait weeks, and sometimes months, to even obtain telephone service and to have that telephone service repaired if problems arise.¹⁰²

Customers are dissatisfied by Innovative's rates and services, complaining that prices are excessive, telecommunications quality is unreliable, new installations are slow and customer service is deficient.¹⁰³ Furthermore, Innovative's own conduct demonstrates that it abuses its market power. Despite being ordered to do so by the VIPSC, Innovative has failed to file quality service reports thus suggesting that Innovative's service is not acceptable. The few reports that Innovative filed demonstrate that Innovative provides poor customer service to its own customers. For example, in the fourth quarter 2004, Innovative's Call Center Response time dropped dramatically, with Innovative responding to only about 30% of the incoming calls within the specified 20-second metric.

Designating Choice as an ETC will provide consumers with an option to Innovative's service. Innovative did not rebut that Choice serves areas of the USVI that Innovative either does not reach or does not wish to serve (*e.g.*, Little St. James Island or Lavango Cay). If Choice is designated as an ETC, then it will have the necessary support to be able to reach other

¹⁰² *See supra* note 4.

¹⁰³ *See id.*; *see also* Comment of Matt Hawes (Mar. 7, 2005) (stating that consumers wait on hold for a substantial period of time before obtaining service from a customer service representative and that phone lines frequently do not work properly in the USVI). In early March, several individuals filed comments in support of Choice's application and expressing their dissatisfaction with Innovative's services. In the ECFS system, the name of the petitioner is listed as Choice and the law firm is listed as Kelley Drye & Warren LLP, Choice's counsel. For clarification, these comments were filed by individual consumers, unfamiliar with ECFS, not by Choice or its counsel.

customers that might not otherwise have telephone service and to provide better telephone service to those persons currently served by Innovative.¹⁰⁴

C. CHOICE OFFERS A PORTABILITY FUNCTION THAT IS BENEFICIAL TO CONSUMERS

Choice's fixed wireless local loop product provides consumers with portability of ease of installation. With this product, consumers simply plug in a device to obtain service initially; if the customer moves, he can unplug the device and take it to its new location served by an access node.¹⁰⁵ The customer would not incur *any* fees to disconnect service at one location and to reinstall at the new location. Nor would the customer be required to wait for the phone company to uninstall and reinstall phone service. In contrast, consumers served by traditional landline phone service usually must have the phone company disconnect service at the old location and reconnect at the new, incurring fees and delay at each end of the process.

VI. CONCLUSION

Choice's Petition demonstrate that it meets the legal and policy requirements necessary for designated as an ETC pursuant to sections 214(e) and 254 of the Act.¹⁰⁶ Further, Choice's Petition comports with the more stringent public interest tests and additional reporting requirements pursuant to the Commission's *Virginia Cellular Order*, and thus designation of Choice as an ETC will further the promotion and advancement of universal service in the USVI. Innovative and Verizon fail to identify any valid basis for delaying or denying Choice's Petition.

¹⁰⁴ Innovative Telephone Corporation Operations Report, Submitted to the Virgin Islands Public Services Commission (Jan. 31, 2005).

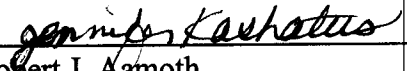
¹⁰⁵ Parrish Aff. ¶ 8.

¹⁰⁶ 47 U.S.C. §§ 214(e), 254.

Based on the foregoing, Choice respectfully requests that the Commission expeditiously grant its Petition.

Respectfully submitted,

CHOICE COMMUNICATIONS LLC


Robert J. Aamoth
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

Its Attorneys

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